standpoint of the individual injured.[9] The difficulty arises in determining which interest is involved in a given set of facts.

Moreover, it would seem that these two rights are exclusive. The use of one's name or picture as property from necessity presupposes publicity to lend it pecuniary value. Again, the very essence of reputation is publicity, so if one's name acquires value through reputation, the interest in privacy is sacrificed. One cannot use his name publicly to any considerable extent and keep it private at the same time. Conversely, if the interest in privacy as such is infringed, no property right in the name or picture can exist. No doubt the unauthorized use by another, although infringing an interest of substance, may cause mental anguish as well as pecuniary loss, as where a reputable physician uses his name on a bottle of medicine and another steals it for advertising some quack remedy. Yet the right violated is still a property right. Reparation for the added mental suffering may be made by giving parasitic damages,[10] but, strictly speaking, no interest in privacy is infringed. The public use of the name refutes any such interest.

In the principal case, the actress treated her picture as property. She consented to its use for a public purpose, and thereby waived any interest in privacy. Consequently, no right of privacy under the statute was involved. But the court should have protected the assignment as a right of property.[11]

RECOVERY FOR GOODS SOLD BY AN ILLEGAL COMBINATION. — Once more the United States Supreme Court has had presented to it the question whether a combination violating the Sherman Anti-Trust Act may recover for goods sold on a contract legal in itself but a part of a scheme to perpetuate the monopoly. *Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165. The defendant alleged that the plaintiff, an illegal combination, in order to continue its monopoly, had perfected a profit-sharing scheme, which punished the failure to deal with the plaintiff exclusively in any given year by the forfeiture of a rebate on previous purchases. It was also alleged that every contract provided that the goods were not for resale. The court held that these allegations constituted no defense.

Since persons are not ousted from law courts merely because they are

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[9] This is well illustrated in the case of Ellis *v.* Hurst, 66 N. Y. Misc. 235, 121 N. Y. Supp. 438. The plaintiff, well known as an author under a *nom de plume* which he always assumed, sought an injunction to restrain the defendant from surreptitiously using his true name in connection with an unauthorized publication of the plaintiff's works. No objection was made to the publication of the books themselves. The court rightly granted relief under the New York statute as a violation of the right of privacy. Clearly an interest of personality was alone infringed. But had the plaintiff written under his true name, its unauthorized use would have violated a property right similar in nature to his right in the books themselves.

[10] *Cf.* 27 HARV. L. REV. 87.

[11] The New York statutory right of privacy would seem broader than the common-law right. If the actress had not consented to the use of her picture by the defendant, on the wording of the statute she still had a cause of action against him for using her name for advertising purposes without her written consent, although her interest in privacy was gone.

law breakers, it is now clear that the mere fact that the plaintiff is a monopoly does not bar its recovery.[1] On the other hand, if the very contract in suit is illegal it plainly cannot be enforced.[2] The situation in the principal case falls between these two elementary propositions. The contract was intrinsically legal;[3] but when taken together with other contracts, it did no doubt tend to further the continued existence of the monopoly. This relation the court refused to consider. Substantially the same facts have come before the Supreme Court twice before. In the first case, however, the court managed to find no tendency in the contract sued on to perpetuate the monopoly.[4] But in the second, where the connection between the contract and the illegal combination was perhaps more clear, a divided court recognized it and decided for the defendant.[5] In material facts it is difficult to distinguish this case from the principal case,[6] and it is therefore overruled in substance, or at least limited to its very facts in that the contract there sued on might possibly have been of itself illegal.[7]

As a matter of contract law, it is a question of some difficulty to determine whether a contract intrinsically legal is tainted with illegality because it is part of a monopolistic scheme. It is obvious that these unoffending contracts, sufficiently duplicated, may be the very foundation of monopoly. This is recognized when the public attacks a combination directly,[8] and although in a private suit on the separate contract the public interest is not quite so closely affected, yet the weight of authority here also considers it unenforceable because of its unlawful tendency.[9]

The only justification, therefore, for the result in the principal case must be that the Anti-Trust Law cuts off all search into the illegality of monopolies other than by the methods it prescribes. Such a doctrine would be highly desirable. It would relieve plaintiffs of the troublesome necessity of establishing their innocence to the satisfaction of any and every court which chanced to have jurisdiction, and leave the conclusive decision of important and complicated "trust" questions once and for

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[1] Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540. See 22 HARV. L. REV. 435.

[2] Patterson *v.* Imperial Window Glass Co., 91 Kan. 201, 137 Pac. 955.

[3] Fuller *v.* Hope, 163 Pa. St. 62, 29 Atl. 779; Matthews *v.* Associated Press, 136 N. Y. 333, 32 N. E. 981. Perhaps such a contract would now be illegal. See CLAYTON ANTI-TRUST ACT, § 3 (approved Oct. 15, 1914).

[4] Connolly *v.* Union Sewer Pipe Co., *supra*.

[5] Continental Wall Paper Co. *v.* Voight & Sons Co., 212 U. S. 227; 22 HARV. L. REV. 435.

[6] See International Harvester Co. *v.* Oliver, 192 Fed. 59, 66.

[7] The court in the principal case distinguished the Continental Case on this ground. The dissenting justices in the Continental Case pointed out, however, that the contract was *per se* intrinsically legal.

[8] See Swift & Co. *v.* United States, 196 U. S. 375, 396.

[9] Merchants' Ice & Cold Storage Co. *v.* Rohrman, 138 Ky. 530, 128 S. W. 599; Pacific Factor Co. *v.* Adler, 90 Cal. 110, 27 Pac. 36; Santa Clara Val. M. & L. Co. *v.* Hayes, 76 Cal. 387, 18 Pac. 391; Judd *v.* Harrington, 19 N. Y. Supp. 406; Brent *v.* Gay, 149 Ky. 615, 149 S. W. 915. *Cf.* Morris Run Coal Co *v.* Barclay Coal Co., 68 Pa. 173, 186; Richardson *v.* Buhl, 77 Mich. 632, 43 N. W. 1102. See 22 HARV. L. REV. 435. *Contra*, Trenton Potteries Co. *v.* Oliphant, 58 N. J. Eq. 507, 43 Atl. 723; Carter-Crume Co. *v.* Peurrung, 86 Fed. 439. See also the dissenting opinion of Mr. Justice Holmes in Continental Wall Paper Co. *v.* Voight & Sons Co., *supra*.

all to the federal courts.[10] The Act provides three remedies: dissolution or a criminal prosecution by the government, a forfeiture of property, and an action for threefold damages by any person injured.[11] The last does appear inconsistent with an intention to vest the exclusive right to deal with violations of the Act in the government. Yet here, too, jurisdiction is vested solely in the federal courts;[12] and although one conclusive determination as to the legality of a combination for all purposes is not provided for, at least neither state nor federal courts are affirmatively given jurisdiction to attack monopolies collaterally by refusing to enforce contracts furthering their purposes. The contention that the Act goes further and deprives the courts of the right of such collateral attack is powerfully supported by an analogy in the interpretation of the Act to Regulate Commerce.[13] This, likewise, gives any person the right to sue for damages in any district or circuit court.[14] And it further provides that all existing remedies are preserved, the provisions of the Act being "in addition to such remedies." [15] Yet, in order to prevent interference with what the Supreme Court considered a fundamental policy of the Act, namely, the maintenance of a uniform standard of rates, it construed the Act as depriving courts of their undoubted former jurisdiction to pass upon the reasonableness of rates, unless and until they had been found unreasonable by the Interstate Commerce Commission.[16] Such an interpretation of the Sherman Law, which also has no express provision on the matter, may seem strained.[17] But by means of it the courts are deprived of their otherwise undoubted right to refuse enforcement to contracts furthering illegal monopolies, and the desirable result of the principal case attained.[18]

EVIDENTIAL USE OF MATHEMATICALLY DETERMINED PROBABILITY. — A recent case in New York instancing methods of criminal detection reminiscent of Sherlock Holmes [1] also exhibits what is apparently a new problem in the law of expert evidence. *People* v. *Risley*, 214 N. Y. 75,

[10] See the majority opinion when the principal case was before the Georgia Court of Appeals. Wilder Manufacturing Co. *v.* Corn Products Refining Co., 11 Ga. App. 588, 599, 75 S. E. 918, 923.

[11] 26 U. S. STAT. AT LARGE, 209, §§ 4, 6, 7.

[12] The recent amendment that the result of a government suit will be *primâ facie* evidence in a suit by a private party is also significant. TRADE COMMISSION ACT of Oct. 15, 1914, § 5.

[13] 24 U. S. STAT. AT LARGE, 379.

[14] *Ibid.* § 9.

[15] *Ibid.* § 22.

[16] Texas & Pac. Ry. *v.* Abilene Cotton Oil Co., 204 U. S. 426.

[17] To be sure, in developing common-law principles the courts go slowly in order to avoid judicial legislation. See Holmes, J., in Stack *v.* New York, N. H. & H. R. Co., 177 Mass. 155, 158. But in applying a statute the courts may properly take stronger action in order to carry out the legislative intent. See Lord Haldane in Trim District School Board *v.* Kelley [1914] A. C. 667, 680. *Cf.* 28 HARV. L. REV. 308, n. 12.

[18] A logical application of the analogy would seem also to subject the individual's right to sue for threefold damages to the condition precedent of an adjudication of the illegality of the monopoly in a direct attack by the Attorney-General.

[1] "A Case of Identity," by Sir Arthur Conan Doyle.